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U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D. C. 20207

March 11, 1986

OFFICE OF THE
GENERAL COUNSEL

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Dear Mr. Locker:

In an October 4, 1985 letter, you discussed a preemption question that arises under the Federal Hazardous S&stances Act ("FHSA") and involves a requirement enacted recently in Texas. When you and I met on November 15, 1985 to discuss your letter, you requested an advisory opinion on the question of whether the FHSA preempts the portions of the Texas requirement concerning firms that distribute toys and other articles intended for use by children ("toys").

Enclosed with your letter were a September 20, 1985 letter from the Texas Department of Health ("Texas") to the Toy Manufacturers of America concerning registration; an October 1985 letter from Texas to firms that it believes must register under the new requirement; a blank registration form: Texas' regulations implementing the requirement; a January 7, 1982 National Highway Traffic Safety Administration preemption interpretation; and an August 10, 1983 federal district court memorandum opinion. At our meeting you also provided your October 17, 1985 letter to Texas. On November 19, 1985, Texas submitted a letter on this subject. Enclosed with that letter were the requirement; its implementing regulations, with explanatory comments: and a booklet containing the Texas Hazardous Substances Act and Rules Promulated Thereunder. On February 14, 26, and 27, 1986 Texas sent additional letters, including a legal memorandum. This advisory opinion is based, in part, on all of these documents.

ADVISORY OPINION

Background

The Child Protection Act of 1966 amended the Federal Hazardous Substances Labeling Act to provide a preemption provision that was limited to precautionary labeling requirements. Pub. L. 89-756. Since 1976, however, the FHSA has contained a preemption provision that states in relevant part: "[I]f under regulations of the Commission promulgated under or for the enforcement of section 2(q) a requirement is established to protect against a risk of illness or injury associated with a hazardous substance, no State or political subdivision of a State may establish or continue in effect a requirement applicable to such substance and designed to protect against the same risk of illness or injury unless such requirement is identical to the requirement established under such regulations."' 15 U.S.C. 1261, note (FHSA, section N(b)(l)(B)).

The FHSA defines the term "hazardous substance" to include "[a]ny toy or other article intended for use by children which the [Commission] by regulation determines...presents an electrical, mechanical, or thermal hazard." 15 U.S.C. 1261(f)(l)(D). The FHSA defines the term "banned hazardous substance" to include "any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted." 15 U.S.C. § 1261(q)(l)(A).

The Commission has issued numerous regulations applicable to toys, including the ones mentioned in Texas' letter to TMA: electric trains, toy ovens, toy sewing machines, and toy caps with peak sound pressure levels. 16 C.F.R. Part 1500 et seq. Some of these regulations, such as the one for caps, classify an entire category of toys as hazardous substances and banned hazardous substances. 16 C.F.R. § 1500.18(a)(5). Then, a "companion" regulation exempts some toys in that category from such classification so long as they meet specified safety criteria. 16 C.F.R. § 1500.86(a)(6). A second type of regulation classifies as hazardous substances and banned hazardous substances only toys in a category that fail to meet specified safety criteria. Examples of this type are the regulations for electrical toys, including electric trains and toy ovens. 16 C.F.R. Part 1501.

The Texas Hazardous Substances Act, a state law patterned after the FHSA, defines the term "hazardous substance" to include "any toy or other article other than clothing intended for use by children which presents an electrical, mechanical, or thermal hazard." Section 1(4), Article 4476-13, V.T.C.S. Implementing regulations, which use the same definition, state that they "are designed to conform to and be supplemental to the applicable provisions and requirements of the [FHSA]...." §§205.41(c) and .42.

A recent amendment to the Texas Hazardous Substances Act requires registration and payment of a $150 annual fee by manufacturers, repackers, and distributors of hazardous substances (excluding retailers, unless they distribute hazardous substances made to their specifications), prior to their doing business in the state. Section 2A, Article 4476-13, V.T.C.S. Regulations implementing the amendment again define hazardous substance to include "any toy or other article other than clothing intended for use by children which present% an electrical, mechanical, or thermal hazard...." §205.44(b)(2)(A)(ii), 10 Tex.Reg. 3768 (Sept. 27, 1985).

The implementing regulations specifically apply the registration and fee requirement to manufacturers of hazardous substances "whose products might normally be banned, but who meet specific exemption criteria enabling their products to be sold in Texas...." §205.44(g), Id. The two examples of such products provided in the regulations are toy electric trains and toy caps. §205.44(g)(1) and (2), Id.

Discussion

Based on the FHSA preemption provision, the Texas requirement would be preempted if (1) an FHSA requirement has been established to protect against a risk of illness or injury, (2) the Texas requirement is designed to protect against the same risk, and (3) the Texas requirement is not identical to the FHSA requirement. Unless all three criteria are satisfied, there is no express preemption under section 18(b)(1)(B) of the FHSA. As noted earlier, this advisory opinion will address only possible preemption of the provisions in the Texas requirement that apply to toy firms.

1. FHSA requirements. Numerous FHSA requirements apply to toys that present electrical, mechanical, and thermal risks. While not every such toy or risk is covered by a regulation, there are broad regulations for electrical toys, toys intended for children under eight containing sharp points and edges, toys intended for children under three containing small parts, and others.

These regulations; apply to all toys that potentially present the electrical, mechanical, or thermal risks addressed, and not only to the toys that fail to meet the established safety criteria. In particular, their applicability does not depend on whether they are classified under the FHSA as "hazardous substances." Drawing a substantive distinction between the two types of regulations discussed earlier--the type used to regulate caps, compared with the type used to regulate electrical toys--is not justified because they only differ in regulatory format.

2. Texas requirement. Neither the Texas requirement nor its implementing regulations state directly whether any risk(s) of injury is being addressed. In addition, I am unaware of any legislative history or other explanatory documents that are relevant to this question. The Texas requirement might be protecting against electrical, mechanical, and thermal risks presented by toys, perhaps by identifying firms that make such toys to facilitate any recalls that become necessary. However, it is alternatively possible that the requirement is only intended to raise revenue for the state and not address any risk of injury at all.

3. identicalness. The Texas requirement, for registration and annual payment of a' fee, applies to firms that distribute or make any toy presenting an electrical, mechanical, or thermal hazard. In contrast, the Commission requirements ban toys that present an electrical, mechanical, or thermal risk because of failure to meet established safety criteria.

so long as a toy complies with the Commission's specified safety criteria, its manufacturers and distributors have no other responsibilities under Commission regulations. Under the T'exas requirement, firms must register if they manufacture or distribute any toy presenting a potential electrical, mechanical, or therma1 risk, regardless of whether such toys comply with the Commission regulations addressing those risks.

This situation has some similarities to one addressed by a federal court in 1983. Juvenile Products Manufacturers Association, Inc. v. Edmisten, 568 F.Supp. 714, 716 (E.D.N.Car. 1983). North Carolina was requiring manufacturers to undergo a fee-based verification process for compliance of their child passenger restraint systems (car seats) with the applicable federal standard: The court held North Carolina's law to be preempted, under a federal statutory scheme that is similar to the FHSA scheme.

The court concluded that

> Congress sought joint enforcement by both the federal and state governments to insure the legislation's success. While the states play an important role in the success of the federal standards, that role must be performed within the prescribed limitations. Even when states attempt to enforce standards identical to those existing at the federal level, they may not do so in any way which significantly burdens manufacturers....

Id. at 719. Based on available information, I cannot determine confidently the validity of the Texas requirement for registration and annual fee payment by toy firms.

Conclusion

For the reasons discussed above, I conclude that FHSA requirements have been established to protect against electrical, mechanical, and thermal risks presented by toys. However, I cannot conclude whether the Texas requirement-is designed to protect against those same risks or, if so, whether it is "identical" to the FHSA requirements.

Sincerely yours,

Daniel R. Levinson

Daniel R. Levinson
General Counsel

cc: Mr. R.D. Sowards, Jr.
Texas Department of Health